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No. 04-1152

In the Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The Solomon Amendment, 10 U.S.C. 983(b)(1), as amended by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A., Tit. V, Subtit. F, § 552(a) to (d), 118 Stat. 1911, withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers. The question presented is whether the court of appeals erred in holding that the Solomon Amendment likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.

PARTIES TO THE PROCEEDING

Petitioners are Donald H. Rumsfeld, Margaret Spellings, Elaine Chao, Michael O. Leavitt, Norman Y. Mineta, and Michael Chertoff. Respondents are Forum for Academic and Institutional Rights, Society of American Law Teachers, Coalition for Equality, Rutgers Gay and Lesbian Caucus, Pam Nickisher, Leslie Fischer, Michael Blauschild, and Erwin Chemerinsky.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-81a) is reported at 390 F.3d 219. The opinion of the district court (Pet. App. 82a-184a) is reported at 291 F. Supp. 2d 269.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2004. The petition for a writ of certiorari was filed on February 28, 2005, and was granted on May 2, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Solomon Amendment, 10 U.S.C. 983, as amended by the Ronald W. Reagan National Defense Authoriza-

tion Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A., Tit. V, Subtit. F, § 552(a) to (d), 118 Stat. 1911, is set forth in the appendix to the petition (Pet. App. 185a-188a). The First Amendment to the Constitution provides that "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

1. Article I of the Constitution vests Congress with the power to "raise and support" military forces for the defense of the United States. U.S. Const. Art. I, § 8, Cls. 12-13. Enlisting qualified men and women in the military is essential in fulfilling that task. Except when military exigency has required resort to conscription, Congress has relied on voluntary enlistment as the most effective means of meeting its staffing needs. As a result, the defense of the United States depends on the ability of the armed forces to attract men and women who have the skills needed for the Nation's defense.

To meet that challenge, Congress has long required the armed forces to "conduct intensive recruiting campaigns" to encourage military enlistments. 10 U.S.C. 503(a)(1), As the demands of military service have grown more complex, the military has placed increasing emphasis on recruiting students from colleges and universities. At times, however, institutions of higher education have sought to restrict campus recruiting by the military.

Drawing not only on its authority to raise and support the armed forces, but also on its authority to "provide for the common Defence and general Welfare of the United States," U.S. Const. Art. I, §8, Cl. 1, and its authority to enact all laws necessary and proper to effectuate its Spending Power, *id.*, Art. I, § 8, Cl. 18,

Congress has enacted measures to encourage institutions of higher education to open up their campuses to military recruiters. In 1968, for example, Congress directed the National Aeronautics and Space Administration to withhold grants from nonprofit institutions of higher education that barred military recruiters from their campuses. National Aeronautics and Space Administration Authorization Act of 1969, Pub. L. No. 90-373, § 1(h), 82 Stat. 281. Similarly, in 1972, Congress enacted a law directing the Department of Defense to withhold funds from educational institutions that barred military recruiters from their campuses. Act of Sept. 26, 1972, Pub. L. No. 92-436, Tit. VI, § 606, 86 Stat. 740.

In 1994, some institutions of higher education were still barring military recruiters from campus. 140 Cong. Rec. 11,438 (1994). Congress therefore enacted a new law to encourage institutions of higher education to provide access to military recruiters. That law, known as the Solomon Amendment, specified that "[n]o funds available to the Department of Defense may be provided by grant or contract to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes * * * entry to campuses or access to students on campuses." National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, Div. A, Tit. V, Subtit. E, § 558, 108 Stat. 2776. The Solomon Amendment was similar to the 1972 Act, except that it removed from the Secretary of Defense any discretion to waive the funding condition. Compare § 558, 108 Stat. 2776, with § 606, 86 Stat. 740.

Representative Solomon explained the need for the new law. He stated that while "recruiting is the key to an all-volunteer army," in recent years, the military had

been "unable to find enough recruits to fill the current number of slots, especially with high-caliber students." 140 Cong. Rec. at 11,438. Representative Solomon stressed that encouraging institutions of higher education to open up their campuses to military recruiters was crucial to achieving recruitment goals because the military's previous recruitment success was "in large part due to recruiting on school campuses, both high school and college." *Ibid.*

Two years later, Congress expanded the funding condition to funds administered by the Departments of Labor, Health and Human Services, Education, and Transportation. Departments of Labor, Health & Human Services, and Education and Related Agencies Appropriations Act, 1997 (1997 Act), Pub. L. No. 104-208, Div. A, Tit. I, § 514(b), 110 Stat. 3009-271. In debate on that amendment, Representative Solomon reiterated the pressing need for the Solomon Amendment. He stated:

> [R]ecruiting is the key to our all-volunteer military forces, which have been such a spectacular success. Recruiters have been able to enlist such promising volunteers for our Armed Forces by going into high schools and colleges and informing young people of the increased opportunities that a military tour or career can provide. That is why we need this amendment.

142 Cong. Rec. 16,860 (1996). Representative Goodlatte similarly stated: "Campus recruiting is a vitally important component of the military's effort to attract our Nation's best and brightest young people," and institutions that exclude military recruiters "interfere with the Federal Government's constitutionally mandated function of raising a military." *Id.* at 12,712.

Congress has since expanded the Solomon Amendment to cover more funding agencies. In its current form, the funding condition applies to funds administered by the Departments of Defense, Labor, Health and Human Services, Education, Transportation, and Homeland Security, the National Nuclear Security Administration, and the Central Intelligence Agency. 10 U.S.C. 983(d)(1) and (2), as amended by 2005 Act, Pub. L. No. 108-375, Div. A., Tit. V, § 552(a) to (d), 118 Stat. 1911-1912. Congress has excepted from the funding condition funds provided for student financial assistance. *Ibid.*

Congress has also amended the Solomon Amendment in other respects. In one amendment, Congress made clear that a denial of access by a "subelement" of an "institution" would lead to a withholding of funding from the entire "institution," including any "subelement." National Defense Authorization Act for Fiscal Year 2000 (2000 Act), Pub. L. No. 106-65, § 549(a), 113 Stat. 610. In another, Congress created an exception to its funding condition for institutions that have a long-standing policy of pacifism based on historical religious affiliation. 1997 Act § 514(c)(2), 110 Stat. 3009-271; 2000 Act § 549(a), 113 Stat. 610.

Most recently, Congress has added an amendment designed to ensure that military recruiters receive the same access to college campuses and students as other employers. In enforcing the Solomon Amendment, the Department of Defense, while seeking access for recruiting purposes, at first did not uniformly insist on obtaining the same degree of access to an institution's campus and students as that enjoyed by other employers. Pet. App. 7a. In the fall of 2001, however, the Department of Defense began to inform institutions that it

would withhold federal funds from institutions that did not afford equal access. *Id.* at 8a.

In 2004, Congress enacted an amendment expressly ratifying the equal access interpretation of the Solomon Amendment. In its current form, the Solomon Amendment now provides that specified federal funds may not be provided to an "institution of higher education," or a "subelement" of such an institution, if the institution or subelement "has a policy or practice" that "either prohibits, or in effect prevents" military recruiters from "gaining access" to campuses or students "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." Pet. App. 185a-186a; 2005 Act, § 552, 118 Stat. at 1911.

The House Committee report accompanying the 2004 amendment explained the importance of equal access:

> [A]t no time since World War II has our Nation's freedom and security relied more upon our military than now as we engage in the global war on terrorism. Our Nation's all volunteer armed services have been called upon to serve and they are performing their mission at the highest standard. The military's ability to perform at this standard can only be maintained with effective and uninhibited recruitment programs. Successful recruitment relies heavily upon the ability of military recruiters to have access to students on the campuses of colleges and universities that is equal to [that of] other employers.

H.R. Rep. No. 443(I), 108th Cong. 2d Sess. 3-4 (2004).

2. Under 10 U.S.C. 654, a person generally may not serve in the armed forces if he has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex. The courts have repeatedly sustained the constitutionality of that policy.[1]

The American Association of Law Schools (AALS) is a non-profit association that has more than 160 law schools as members. Pet. App. 95a. Since 1990, the AALS has required its members to withhold "any form of placement assistance or use of the school's facilities" from employers who discriminate on the basis of sexual orientation or other specified criteria. J.A. 251-252 (AALS Bylaws §§ 6-4(b), 6.19). In response, most law schools adopted policies denying employers access to their career services facilities unless the employers certify that they do not discriminate on the basis of sexual orientation. Pet. App. 3a.

Following enactment of the Solomon Amendment, the AALS authorized member schools to permit military recruiters to use their career service facilities provided that the schools took steps to "ameliorate" the perceived impact of military recruiting on the student body. Pet. App. 96a-97a. The AALS advised that such amelioration should include informing students and the law school community that the military discriminates on a basis not permitted by the school's rules and that the military is being permitted to interview only because of the loss of funds that would otherwise be imposed under the Solomon Amendment or because of higher university directives. *Ibid.*

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[1] See *Able* v. *United States*, 155 F.3d 628 (2d Cir. 1998); *Holmes* v. *California Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997), cert. denied, 525 U.S. 1067 (1999); *Philips* v. *Perry*, 106 F.3d 1420 (9th Cir. 1997); *Richenberg* v. *Perry*, 97 F.3d 256 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997); *Thomasson* v. *Perry*, 80 F.3d 915 (4th Cir.) (en banc), cert. denied, 519 U.S. 948 (1996); see also *Steffan* v. *Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc).

Most law schools began to allow military recruiters to enter their campuses, while simultaneously expressing disapproval of the military's restrictions on service by homosexuals. Pet. App. 97a-99a. Law schools posted statements advising students that the military does not comply with the schools' policies. *Id.* at 98a. Faculty and student groups adopted resolutions condemning the military's policies. *Ibid.* And students and faculty held demonstrations protesting on-campus military recruitment. *Ibid.* Despite advice from the AALS that schools could make exceptions for the military, many schools still refused to provide military recruiters with access equal to that offered to other employers. *Id.* at 99a. The Department of Defense then clarified that the Solomon Amendment conditions federal funding on equal access, and notified law schools that the failure to provide equal access could lead to the withholding of federal funds. *Id.* at 101a. Almost all law schools that receive federal funding subsequently provided equal access to military recruiters. *Id.* at 102a.

3. The Forum for Academic and Institutional Rights, Inc. (FAIR) is an association of certain law schools and law school faculties. In September 2003, FAIR and others (respondents) brought suit against Secretary of Defense Donald R. Rumsfeld and others (petitioners) in the United States District Court for the District of New Jersey. Pet. App. 10a. Respondents alleged, *inter alia*, that the Solomon Amendment violates the First Amendment rights of law schools. *Id.* at 12a. Respondents immediately moved for a temporary restraining order and a preliminary injunction. *Id.* at 86a. The district court denied the request for a temporary restraining order, but required petitioners to respond to the preliminary injunction motion within seven days. *Ibid.* The district court subsequently denied respondents' request for a preliminary injunction. *Id.* at 82a-184a.

Applying the First Amendment standard for laws that affect expressive conduct, see *United States* v. *O'Brien*, 391 U.S. 367 (1968), the district court held that the Solomon Amendment does not violate respondents' First Amendment rights. Pet. App. 161a-166a. The court reasoned that the Solomon Amendment furthers the important government interest in raising a volunteer military, *id.* at 162a-163a, that the military's recruitment effort will be less effective if military recruiters are denied equal access to campuses and their students, *id.* at 164a, and that the Solomon Amendment does not seek to suppress ideas, *id.* at 165a-166a. The court emphasized that institutions are free to denounce the military's policies without risking the loss of federal funds. *Id.* at 166a.[2]

4. A divided panel of the Third Circuit reversed. Pet. App. 1a-81a. The panel majority held that respondents are likely to prevail on their claim that the Solomon Amendment violates the First Amendment, and it directed the district court to issue a preliminary injunction against its enforcement on that basis. *Id.* at 11a-48a.

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[2] The district court held that FAIR, individual students, faculty members, two law school student organizations, and a national association of law professors had standing to challenge the constitutionality of the Solomon Amendment. Pet. App. 84a-86a, 103a-128a. The court of appeals held that FAIR had standing, and did not determine the standing of any other party. *Id.* at 10a-11a n.7. In its second amended complaint, FAIR identified two of its members, Golden Gate University School of Law and the faculty of Whittier Law School. *Id.* at 87a. The United States agrees that FAIR has standing to represent identified law schools. See Pet. 7 n.2.

The court of appeals viewed the Solomon Amendment's funding condition as the equivalent of a direct regulatory requirement that institutions afford military recruiters equal access to their campuses and students. Pet. App. 11a-12a & n.9. The court then held that the Solomon Amendment is subject to strict scrutiny under the First Amendment on two grounds. *Id.* at 13a-15a.

First, the court concluded that the Solomon Amendment directly burdens the right of educational institutions to engage in expressive association. Pet. App. 15a-22a. The court reasoned that the presence of military recruiters on campus would force law schools to send a message that they accept discrimination against homosexuals as a legitimate form of behavior. *Id.* at 18a. Second, the court concluded that the Solomon Amendment implicates the compelled speech doctrine because it forces laws schools to propagate, accommodate, and subsidize a message regarding the service of homosexuals in the military with which they disagree. *Id.* at 25a-39a. Applying strict scrutiny, the court concluded that the government had failed to establish that there are no alternative means for effective recruitment of military personnel that would be less restrictive than the Solomon Amendment. Pet. App. 22a-24a.

The court of appeals also concluded that respondents would be entitled to a preliminary injunction even if the *O'Brien* standard rather than strict scrutiny were applicable. Pet. App. 43a-47a. The court held that a denial of equal access to military recruiters involves expressive conduct. *Id.* at 43a-44a. The court further concluded the government was required to supply specific evidence to the district court that the Solomon Amendment enhances the military's recruitment effort in order to sustain the Amendment under *O'Brien*. *Id.* at 45a.

Judge Aldisert dissented. Pet. App. 48a-81a. Applying the *O'Brien* framework, he concluded that the Solomon Amendment is constitutional. *Id.* at 78a-81a.

5. The government filed a motion in the court of appeals to stay the mandate pending the filing of a certiorari petition. By order dated January 20, 2005, the court of appeals granted a stay. By order dated February 2, 2005, the court denied respondents' motion to reconsider the stay.

SUMMARY OF ARGUMENT

A. In order to recruit the most talented men and women into the armed services, the military must be able to recruit students on college and university campuses, just as other employers do. Some colleges and universities, however, have denied military recruiters access to their students and campuses. To address that serious problem, the Solomon Amendment conditions the furnishing of federal funds to institutions of higher education on the institutions' agreement to grant military recruiters the same access to students that they provide to the recruiters of other employers.

That approach promotes the government's interest in recruiting the most talented men and women for the military, while at the same time respecting the legitimate interests of educational institutions. It is a condition on federal funding, not a direct mandate. It allows educational institutions to determine the level of access that recruiters, including military recruiters, receive. It asks only that, in exchange for supporting the education of an institution's students, the federal government should have an equal opportunity to recruit the very students whose education it has supported. And it leaves educational institutions entirely free to criticize the military on whatever ground they wish. For those

reasons, the Solomon Amendment falls well within Congress's authority to provide for the common defense and to raise and support the Nation's armed forces.

The court of appeals nonetheless held that the Solomon Amendment likely violates the First Amendment. In particular, the court concluded that the Solomon Amendment likely violates the right to associate, the compelled speech doctrine, the *O'Brien* standard, and the doctrine of unconstitutional conditions. Each of those holdings is incorrect.

B. Respondents' associational rights and *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), do not support the court of appeals' view that an educational institution may voluntarily associate with the government's money and then claim a First Amendment right not to associate with the government. The state law in *Dale* interfered with an expressive association's right to determine its own membership, and it forced an expressive association to convey a message that was contrary to its beliefs. The Solomon Amendment does neither.

The Solomon Amendment does not affect the criteria for determining an educational institution's internal composition. Recruiters for outside employers are not members of an educational institution; their presence on campus is temporary and episodic, and their functions is to recruit persons for employment *outside* the school. The presence of military recruiters on campus also does not force educational institutions to convey the message that they support the restrictions on service by homosexuals in the military. Students and the public readily understand that when recruiters visit campus they speak for their employers, not for the educational institution. Just as the policies of numerous other employers who send recruiters to campus are not

attributed to educational institutions, neither are the policies of the military.

Moreover, unlike the state law invalidated in *Dale*, the Solomon Amendment is a condition on funding, not a direct regulatory mandate. A party may not voluntarily accept federal money and then claim that a condition on the receipt of that money violates its right to associate. See *Grove City College* v. *Bell*, 465 U.S. 555 (1984).

C. The compelled speech doctrine applies only when a party "is obliged personally to express a message he disagrees with." *Johanns* v. *Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2060 (2005). The Solomon Amendment does not violate the compelled speech doctrine because it does not force educational institutions to express any support for the restrictions on service in the military by homosexuals. Institutions need not utter any words of endorsement for that policy; nor must their representatives carry a sign expressing support for that policy. Educational institutions need only provide military recruiters the same access to students as they provide to the recruiters of other employers. The speech of the recruiters remains the speech of the government and the military—not the institution.

The compelled speech doctrine is also not implicated because the Solomon Amendment does not *compel* educational institutions to do anything. If they do not wish to furnish military recruiters with equal access to their students, they may decline federal assistance.

D. The Solomon Amendment is not subject to the standard for the regulation of expressive conduct set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). A denial of equal access does not resemble the kind of conduct that the Court has viewed as sufficiently expressive to constitute "speech" within the meaning of

the First Amendment. It does not involve the use of expressive symbols, such as an American flag or a black armband; nor does it involve traditional public protest activities such as peaceful picketing or sit-ins. Moreover, there is nothing inherently expressive about denying military recruiters equal access, and an institution's statement in advance about its reason for denying equal access does not transform that conduct into speech. Such prefatory and explanatory comments would give any conduct expressive content and would render the *O'Brien* test the general rule for conduct, rather than the exception.

In any event, the Solomon Amendment satisfies the *O'Brien* standard. Congress reasonably concluded that on-campus recruiting furthers the government's interest in recruiting the most talented men and women for the armed forces. Congress understood that the military's previous success in recruiting college and university students was due in large part to on-campus recruitment. That is consistent with the experience of other employers. If on-campus recruitment were not effective, institutions would not invite employers to recruit on campus and employers would not travel to campus to do so. And, in employing a rule of equal access, the Solomon Amendment relies on the educational institutions' own assessment of what is required for effective recruiting on their campuses. Further proof of the connection between the equal access condition and the goal of recruiting the most talented men and women for the military is not required. That is particularly true because if institutions do not believe there is a sufficient factual predicate for Congress's action, they are free to decline federal assistance.

E. The Solomon Amendment does not violate the doctrine of unconstitutional conditions. Any such argument fails at the premise: the Solomon Amendment's equal access condition is constitutional and would be constitutional even if it were imposed as a direct mandate. In any event, Congress's authority under the Spending Clause is exceeded only when Congress aims at the suppression of ideas. *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587 (1998). The Solomon Amendment is aimed at an institution's conduct in denying equal access; it is not aimed at the suppression of ideas.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT THE SOLOMON AMENDMENT LIKELY VIOLATES THE FIRST AMENDMENT

A. The Solomon Amendment Is A Carefully Tailored Exercise Of Congress's Authority To Provide For The Common Defense And To Raise And Support The Armed Forces

The success of the Nation's all-voluntary military depends on a military recruitment program that is able to attract the most talented men and women to the armed services. In order to have an effective recruitment program, the military must be able reach college and university students on campus, just as numerous other employers do. Before the enactment of the Solomon Amendment, however, some colleges and universities were denying military recruiters access to their campuses and students, and there was reason to conclude that they would continue to do so absent further congressional action.

The Solomon Amendment is a measured response to that pressing problem. In furtherance of Congress's authority to "provide for the common Defence and general Welfare," U.S. Const., Art. I, § 8, Cl. 1, and to

"raise and support Armies" and "provide and maintain a Navy" U.S. Const., Art. I, § 8, Cls. 12 and 13, the Solomon Amendment withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers. 10 U.S.C. 983(b)(1), as amended by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (2005 Act), Pub. L. No. 108-375, Div. A., Tit. V, Subtit. F, § 552(a) to (d), 118 Stat. 1911.

Four features of the Solomon Amendment demonstrate that it promotes the government's interest in recruiting the most talented men and women to the military while at the same time respecting the legitimate interests of educational institutions. First, the Solomon Amendment does not take the form of a direct mandate. Rather, it conditions the availability of specified federal funds on institutions affording equal access. Thus, only institutions that voluntarily take federal funds have an obligation to furnish equal access to military recruiters. Those that decline federal assistance are free to deny equal access as well, but those that voluntarily associate with the federal government for purposes of receiving funding take that funding subject to the equal access provisions of the Solomon Amendment.

Second, the Solomon Amendment does not prescribe any fixed level of access that educational institutions must afford to military recruiters. It instead simply asks educational institutions to give the military the same level of access that the institutions deem appropriate for other employers. That equal access standard preserves maximum discretion to educational institutions to decide the level and type of access they will provide, while ensuring that the military is not placed at a competitive disadvantage relative to other potential employers in the search for the most talented men and women.

Third, the Solomon Amendment's equal access condition is directly related to the nature of the funding that is extended. The Solomon Amendment merely proposes that, in exchange for supporting the education of an institution's students, the federal government should have an equal opportunity to recruit the very students whose education it has supported.

Finally, the Solomon Amendment is addressed solely to an institution's *conduct* in denying equal access—conduct that undermines the military's recruitment effort, particularly in a time of War. It leaves institutions of higher education entirely free to criticize the military directly on whatever ground they choose without any risk of the loss of federal funds. Indeed, as the record reflects (Pet. App. 98a), educational institutions, their faculties, and their students have sharply criticized the statutory provision governing military service by homosexuals, and the Department of Defense has never threatened to withdraw federal funding based on that criticism.

For these reasons, the modest and tailored funding condition in the Solomon Amendment falls well within the authority of Congress to enact "necessary and proper" laws to carry into execution its powers under the Spending Clause and its other enumerated powers critical to the National defense. U.S. Const., Art. I, § 8, Cl. 18. The court of appeals nonetheless ordered the district court to enjoin the Solomon Amendment, holding that the Solomon Amendment likely violates the First Amendment right to associate for expressive purposes, the compelled speech doctrine, the *O'Brien* standard, and the doctrine of unconstitutional conditions.

Those holdings are incorrect and rest on a series of legal errors.

B. The Solomon Amendment Does Not Violate The First Amendment Right To Associate Recognized in *Boy Scouts of America* v. *Dale*

The court of appeals held that the Solomon Amendment interferes with a law school's First Amendment right to associate for expressive purposes and therefore triggers strict scrutiny. Pet. App. 15a-22a. No decision of this Court supports the court of appeals' view that an educational institution may voluntarily associate itself with the government's money, and then claim a First Amendment right not to associate with the government. The sole decision cited by the court of appeals to support its right-to-associate holding is *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000). *Dale*, however, provides no support for that holding.

In *Dale*, the Court invalidated a state law that required the Boy Scouts to accept gay men as leaders of its organization. The Court held that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648. Applying that standard, the Court found that "Dale's presence as an assistant scoutmaster would * * * surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," because it would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653-654.

As the Court's analysis demonstrates, the law invalidated in *Dale* had two crucial features that together caused it to run afoul of the First Amendment. First, it interfered with an expressive organization's interest in determining its own internal composition. Second, and relatedly, it forced an expressive organization to communicate a message that was contrary to its beliefs. The Solomon Amendment does neither of those two things.

1. *The Solomon Amendment does not affect an educational institution's internal composition*

The Solomon Amendment is not concerned with an institution's method of determining its own internal composition. It does not establish criteria for the selection of administrators, faculty, or students. Recruiters are almost by definition outsiders who are not a part of the institution itself, and they do not become members through their recruiting activities.

Far from intruding on an institution's interest in determining its own internal composition, the Solomon Amendment is concerned with the terms on which *outside* employers will temporarily and episodically visit the school, and more broadly with employment *outside* the school. Such employment is an integral part of the economic activity of the Nation and has long been subject to governmental regulation through anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, 42 U.S.C. 2000e *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. 12101, *et seq.*, as well as numerous other laws. Educational institutions do not have any unique constitutional immunity to the application of laws that secure equal access to employment opportunities for their students or otherwise regulate employment activities,

such as recruiting. A school could not, for example, assert a "*Dale* right" to exclude minority-owned enterprises from the recruiting process. Indeed, most employment laws apply fully to a university's own employment decisions, even when those decisions determine the persons who will be involved in the institution's own internal affairs, yet the Court has never suggested that such laws run could run afoul of the First Amendment. See, *e.g.*, *University of Pa.* v. *EEOC*, 493 U.S. 182 (1990). Because the Solomon Amendment does not affect internal composition, but only an institution's temporary and episodic relationship with outside employers, there is even less basis for a claim that it impairs the right to associate.

2. *The Solomon Amendment does not force institutions to take a position that is contrary to their beliefs*

The Solomon Amendment also does not contain the other crucial feature of the law condemned in *Dale*. Unlike the state law in *Dale*, the Solomon Amendment does not force an institution to take a position on an issue that is inconsistent with its beliefs. Because a scout leader purports to speak for the Boy Scouts, the presence of a homosexual scout leader sent a message to its youth members and the public that the Boy Scouts approve of homosexual conduct. The Solomon Amendment has no comparable effect. Students and the public both can readily understand that military recruiters speak for the military, not for the educational institutions they visit.

Indeed, a part of the function of institutions of higher education is to expose students to a wide range of views, and students are accustomed to hearing visitors on campus whose views the university does not endorse. In that context, an institution's decision to allow military recruiters on campus cannot reasonably be understood to reflect an endorsement by the institution of the Act of Congress regarding service by homosexuals in the military. That is particularly true because military recruiters who come to campus pursuant to the Solomon Amendment receive the same access to students as the recruiters of numerous other employers, and those other recruiters are understood to speak for their employers, rather than the institution. No one would suppose, for example, that a law school endorses any "message" embedded in the work of corporate law firms, public interest groups across the ideological spectrum, or federal, state, and local governments, simply because their representatives come to the university to recruit. The same is true of military recruiters.

In another equal access context, the Court concluded that "secondary school students are mature enough" to comprehend the difference between speech the school sponsors and speech "it merely permits" pursuant to an equal access policy. *Westside Cmty Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion); accord *id.* at 268 (Marshall, J., concurring); see also *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833-834, 841 (1995) (distinguishing university's own speech from speech it facilitates on a neutral basis). If high school students can perceive the difference between the school's own speech and the speech of student groups that meet regularly on school grounds, law school students can perceive a difference between the institution's message and the speech of outside recruiters visiting campus once or twice a year. When an institution gives military recruiters the same access as the recruiters of other employers, it no more endorses the policies of the military than it endorses the policies

of the numerous other employers that send recruiters to campus. Cf. *Mergens*, 496 U.S. at 252 (plurality opinion) (A school that permits a religious club to meet after school, just as it permits any other student group to do, "does not convey a message of state approval or endorsement of the particular religion."); *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981) (A forum that is available to a broad class of nonreligious as well as religious speakers "does not confer any imprimatur of state approval on religious sects or practices.").

Furthermore, an institution is fully equipped to explain why it allows military recruiters the same access to its students as the recruiters of other employers. For example, an institution is free to inform students and the public that it opposes Congress's policy regarding the service of homosexuals in the military, but that it has nonetheless allowed the military to recruit in order to receive federal funding that can have enormously beneficial effects for students, faculty, and the public at-large. J.A. 44-45. Students and the public should have no difficulty understanding that message. Cf. *Mergens*, 496 U.S. at 251 (plurality opinion) ("petitioner's fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students").[3]

[3] The court of appeals concluded that the Solomon Amendment does not permit recipients to criticize the federal statutory restrictions on the service of homosexuals in the military. Pet. App. 36a. That conclusion has no grounding in the Solomon Amendment's text. It conditions federal assistance on equal access to campus and students, not on equal statements of support for the employer's policies. Moreover, as the record in this case demonstrates, many law schools, faculty members, and students have vociferously criticized the restrictions on military service by homosexuals, *id.* at 97a-98a, and the Department of Defense has never attempted to cut off federal funding based on such criticism.

3. *The right to associate is not impaired simply because an organization asserts that it is*

Despite the two fundamental differences between the statute at issue in *Dale* and the Solomon Amendment, the court of appeals nonetheless concluded that the Solomon Amendment is likely unconstitutional under *Dale*. The court reached that conclusion by extrapolating from *Dale* the principle that an expressive association's right to associate is impaired whenever the association says so. Pet. App. 21a. That proposition has no grounding in the *Dale* decision and no logical stopping point. The Court in *Dale* did not condemn the state law at issue simply because the Boy Scouts claimed that it interfered with its right to expressive association. Rather, the Court invalidated that state law because it interfered with the Boy Scouts' interest in determining its own membership and leadership and because it required the organization to convey a message that was contrary to its beliefs. 530 U.S. at 648, 653-654. Because the Solomon Amendment does neither, it does not implicate the First Amendment right to associate.

4. Dale *is also inapplicable because institutions can avoid the equal access condition by declining federal funds*

There is an additional reason why the Solomon Amendment does not impermissibly intrude on the right to associate recognized in *Dale*. It involves a condition on federal assistance, not a regulatory requirement. If institutions of higher education do not wish to associate with military recruiters, they may simply de-

cline to associate themselves with the government's money.

The Court's decision in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), demonstrates that when a party voluntarily accepts federal money, it may not claim that the conditions on the receipt of that money violate its First Amendment right to associate. In *Grove City*, the Court unanimously rejected a college's claim that Title IX's prohibition against discrimination on the basis of sex in programs that receive federal assistance violated the college's right to associate. The Court explained that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept," and that the college could avoid Title IX's equal opportunity condition by "terminat[ing] its participation in the [educational grant] program." *Id.* at 575; see also *Mergens*, 496 U.S. at 241 ("school district seeking to escape the statute's obligations could simply forgo federal funding").

The right-to-associate claim in this case has no firmer foundation than the claim rejected in *Grove City*. Indeed, while Title IX does govern the *internal* relationship among an institution and its students, the Solomon Amendment addresses the external and temporary relationship between an institution and an outside entity, the federal government itself. The United States is doing no more than any donor to an institution of higher education might reasonably do. It offers support for the institution's education program, and in return, seeks an equal opportunity to recruit the very students whose education it is supporting. Nothing in the Court's decision in *Dale* remotely suggests that an institution seeking the government's support may unilaterally dictate the terms of its association with the government.

The educational institution cannot find the United States to be an acceptable partner in financial arrangements promoting the education of its students and then insist upon a constitutional right to deem the United States unacceptable when it comes to having military representatives on campus recruiting those very students. And that is particularly true when the United States seeks nothing more than the same access to students that the institution affords to other prospective employers.

C. The Solomon Amendment Does Not Implicate The Compelled Speech Doctrine

The court of appeals also held that the Solomon Amendment is subject to strict scrutiny because it impermissibly compels speech. Pet. App. 25a-30a. The Solomon Amendment, however, does not violate the compelled speech doctrine.

1. *The compelled speech doctrine applies when an individual is obliged personally to express a message with which he disagrees*

In "true" compelled speech cases, "an individual is obliged personally to express a message he disagrees with, imposed by the government." *Johanns* v. *Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2060 (2005). For example, in *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), a state law required public school children to recite the Pledge of Allegiance while saluting the flag. Some children refused to comply because they regarded the message they were forced to convey as inconsistent with their religious beliefs. *Id.* at 629. The Court held that the First Amendment does not "le[ave] it open to public authorities to compel [a person] to utter" a message with which he does not agree. *Id.* at 634. Similarly, in *Wooley* v. *Maynard*, 430 U.S. 705

(1977), a state law required state licence plates to bear the state motto "Live Free or Die." *Id.* at 707. The plaintiffs considered the state motto "to be repugnant to their moral, religious, and political beliefs," and began to cover up the motto on the licence plates on their own vehicles. *Ibid.* The Court held that the First Amendment did not permit the State to "force[] an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* 715. The State could not, in effect, require motorists to serve "as a mobile billboard for the State's ideological message." *Ibid.*

2. *The Solomon Amendment does not force an institution to personally express support for Congress's policy regarding service by homosexuals*

The Solomon Amendment does not implicate the rule against compelled speech recognized in *Barnette* and *Wooley* because it does not induce an educational institution "personally to express a message [it] disagrees with." *Livestock Mktg.*, 125 S. Ct. at 2060. The court of appeals held that the Solomon Amendment implicates the compelled speech doctrine because respondents disagree with Congress's policy on the service of homosexuals in the military. Pet. App. 32a. But the Solomon Amendment does not seek to induce a law school "personally to express" its agreement with that policy: law school recipients do not have to "utter" any words of support for the policy, *Barnette*, 319 U.S. at 634; nor do they have to "constantly" carry around "in public view" a "mobile billboard" displaying support for that policy. *Wooley*, 430 U.S. at 715. Instead, they simply must provide military recruiters the same access to students

as they provide to other employers, if they wish to continue to receive federal funds.

The court of appeals found it sufficient for application of the compelled speech doctrine that law schools object to statements made *by military recruiters* that openly homosexual students are ineligible for military service. Pet. App. 32a. But such a statement, if it even came up in a particular interview, would simply report an objective fact in that one-to-one setting about the qualifications for military service. It would be no different from comparable statements made by other recruiters about the qualifications required by their employers. Military recruiters are on campus to explain military careers, encourage students to consider such careers and answer any questions they may have. The recruiters are thus engaged in the focused and serious work of meeting the needs of the Nation's armed forces—not to engage in political or ideological activity or to make speeches in support of Congress's policy concerning service by homosexuals.

More important, however, any such statement describing that policy would be made by the *recruiter*; it would not be personally expressed by the law school. As the Court recently reaffirmed in *Livestock Marketing*, the government's own speech does not provide the basis for a compelled speech claim by the fund recipients. It is only when a person is forced "personally to express a message he disagrees with" (125 S. Ct. at 2060) that the compelled speech doctrine is implicated.[4]

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[4] The court of appeals found that the Solomon Amendment forces law schools to convey the message that all employers are equal. Pet. App. 32a. The Solomon Amendment, however, does no such thing. It conditions federal assistance on institutions furnishing equal access, not on institutions representing that the military is equal to other employers. There is no more compelled

3. *The decisions relied on by the court of appeals do not support its compelled speech holding*

The court of appeals relied on several other cases as support for its compelled speech holding, including *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557,(1995), *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), and *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (196[illegible]). Pet. App. 35a. Those cases, however, provide no support for the court's holding.

In *Hurley*, a state law required a parade organizer to allow a group of individuals to display in its parade a gay pride message that the parade organizer did not like. The Court concluded that the parade organizer was using the parade to express its own point of view, 515 U.S. at 568, that the presence of persons marching under a gay pride banner would likely convey to the public that the parade organizer approved of the message, *id.* at 575, and that disclaiming a message is impractical in a moving parade, *id.* at 577. In those circumstances, the Court held, the state law violated the First Amendment because it "forced upon a speaker intimately connected with the communication advanced" the "dissemination of a view contrary to [its] own." *Id.* at 576.

This case has none of the characteristics that led to the invalidation of the state law in *Hurley*. A law school's recruitment program is not an expressive enterprise akin to a parade, and the purpose of the recruitment program is not to convey the law school's own messages, but to create an opportunity for an exchange of information between students and outside

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speech in the Solomon Amendment's equal access condition than in the equal access provision the Court addressed in *Mergens*.

employers. For reasons already discussed (pp. 20-22, *supra*), the temporary and episodic presence of military recruiters on campus, to the same extent as numerous other private- and public-sector recruiters, does not convey to students or the outside world that law schools endorse the existing rules concerning service by homosexuals in the military. And there is no practical obstacle preventing law schools from informing students and the public that they disapprove of that policy. *Hurley* is therefore inapposite here.

In *Tornillo*, a state law required a newspaper to publish a political candidate's reply to criticism previously published in that newspaper. The Court held the law unconstitutional because it "exact[ed] a penalty on the basis of the content of the newspaper," 418 U.S. at 256, because faced with that penalty editors could well "blunt[] or reduce[]" their coverage of candidates, *id.* at 257, and because the First Amendment leaves the choice of what material to put in a newspaper to the newspaper's "editorial control and judgment," *id.* at 258. This case involves none of those features. The withdrawal of funding under the Solomon Amendment is not based on the content of what institutions of higher education say, but on their denial of equal access. The Solomon Amendment does not deter institutions from criticizing the military's policies; they are free to criticize the military without any risk of losing federal funding. And when engaged in the activities to which the Solomon Amendment is addressed, institutions are not involved in their own expressive enterprise, let alone in the editorial function of deciding what point of view to take in their own publications. They are involved in operating a program that assists outside employers in recruiting their students.

In *Pacific Gas*, a state regulation required a public utility that distributed a newsletter in its billing envelopes to include opposing messages of another speaker in the same envelopes. A plurality of the Court concluded that the regulation violated the First Amendment because its effect would be to deter the utility from engaging in controversial speech, 475 U.S. at 14, and because utilities are so closely identified with their billing envelopes that the inclusion of material in them would force the utility either to appear to agree with the enclosures or to respond, *id.* at 15-16. Those concerns do not exist here. The Solomon Amendment does not deter institutions of higher education from engaging in their own controversial speech; the obligation imposed by the Amendment is triggered not by an institution's own speech, but by the recruiting opportunities it extends to third-parties; and institutions are not so closely identified with the speech of recruiters that the views of the recruiters will be attributed to them unless they respond.[5]

[5] The court of appeals also relied on *United States* v. *United States Foods, Inc.*, 533 U.S. 405 (2001), and *Abood* v. *Detroit Board of Education.*, 431 U.S. 209 (1977), but those cases are compelled subsidy cases, not compelled speech cases. The compelled subsidy doctrine is implicated when a person is compelled to subsidize the speech of a private party he disagrees with. *Livestock Mktg.*, 125 S. Ct. at 2060. Here, however, the government is subsidizing institutions of higher education, rather than the other way around. And the speech at issue is government speech not private party speech. *Id.* at 2062. The compelled subsidy doctrine therefore has no application here.

4. A property owner does not have an unqualified First Amendment right to exclude from its property persons engaged in expressive activity

The court of appeals' compelled speech holding ultimately appears to rest on the notion that the First Amendment gives a property owner a right to exclude from its property anyone engaged in expressive activity. The Court rejected that view in *Pruneyard Shopping Center* v. *Robbins*, 447 U.S. 74 (1980). In that case, a shopping center challenged on compelled speech grounds a state law that permitted individuals to engage in expressive activities on its property. The Court held that the compelled speech doctrine was inapplicable because the property at issue was not reserved for the shopping center's private use, the views expressed by the individuals engaged in expressive activity would not likely be attributed to the shopping center, and the shopping center was free to post signs disavowing any connection between the shopping center and the messages of the individuals. *Id.* at 87.

The situation is the same here, except that the compelled speech concerns are further diluted by the Solomon Amendment's character as a spending condition, rather than a command as in *Pruneyard*. Institutions of higher education do not reserve the property devoted to recruitment to their private use; the views expressed by recruiters are not attributed to the institutions; and the institutions are free to disavow any connection to the messages expressed by recruiters. See also *Turner Broad. Sys., Inc.*. v. *FCC*, 512 U.S. 622, 653-657 (1994) (rejecting compelled speech challenge to a federal statute that required cable television systems to carry local broadcast stations on their systems). For that reason, and because the Solomon Amendment does not condition federal funding on institutions of higher

education personally expressing a view with which they disagree, the Solomon Amendment does not implicate the compelled speech doctrine.

5. The compelled speech doctrine also does not apply because institutions are not compelled to do anything

This case differs from all the other cases in which the Court has invalidated laws under the compelled speech doctrine in another critical respect. In all those cases, the government directly mandated a party to express a view the party disagreed with. *Barnette*, 319 U.S. at 627-630; *Wooley*, 430 U.S. at 707; *Hurley*, 515 U.S. at 561; *Tornillo*, 418 U.S. at 244; *Pacific Gas*, 475 U.S. at 6-7. Educational institutions covered by the Solomon Amendment have not been *compelled* to do anything. They have voluntarily chosen to accept federal funding on the condition that they provide military recruiters with equal access to their students and campuses. Institutions that do not wish to provide equal access to military recruiters may decline federal assistance. Likewise, institutions that do not wish to provide the military use of certain facilities or a particular degree of access can do so and continue to receive federal funding as long as they treat other recruiters the same. The Solomon Amendment does not implicate the compelled speech doctrine because it involves neither compulsion nor the institution's own speech within the meaning of the Court's precedents.

D. The Solomon Amendment Is Not Subject To, But In Any Event Satisfies, The *O'Brien* Standard

The court of appeals held that even if the right of expressive association and the compelled speech doctrine were not implicated, the Solomon Amendment would be subject to review under the standard for the regulation

of expressive conduct set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). Pet. App. 43a-47a. The court of appeals further held that, on the existing record, the Solomon Amendment does not satisfy *O'Brien*'s standard of scrutiny. *Ibid.* Both holdings are incorrect. An institution's denial of equal access is not expressive conduct protected by the First Amendment. And even if it were, the Solomon Amendment satisfies the standards for the regulation of expressive conduct.

1. A denial of equal access is not "speech"

The First Amendment protects the freedom of "speech," not conduct. Nonetheless, the Court has held that some conduct is "sufficiently imbued with elements of communication" to constitute "speech" within the meaning of the First Amendment. *Texas* v. *Johnson*, 491 U.S. 397, 404 (1989). Thus, the Court has held that when a person seeks to convey an idea through the use of an expressive symbol, such as the American flag or a black armband, the First Amendment is implicated. *Id.* at 404-406; *Tinker* v. *Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 509 (1969). Similarly, traditional public protest activities, such as peaceful picketing and sit-ins, also have a measure of First Amendment protection. *Brown* v. *Louisiana*, 383 U.S. 131, 141-142 (1966); *United States* v. *Grace*, 461 U.S. 171, 176-177 (1983).

At the same time, the Court has not "accept[ed] the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. at 376. And the Court has emphasized that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's

friends at a shopping mall—but such a kernel of expression is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989). Thus, the Court has held that ballroom dancing is not "speech" within the meaning of the First Amendment, no matter how determined dance partners are to express an idea. *Ibid.*

The conduct of denying military recruiters equal access does not resemble the conduct that the Court has found sufficiently imbued with an expressive component to constitute speech. It does not involve the use of expressive symbols, such as a flag, or a traditional public protest activity, such as picketing. Furthermore, there is nothing inherently expressive about denying equal access to military recruiters. Such conduct can occur for reasons that have nothing to do with the intent to express a message. For example, institutions may engage in such conduct in order to remove themselves from involvement in what they view as unfair discrimination, or they may simply seek to avoid the controversy that may surround the military's presence on campus. While institutions may also deny equal access to military recruiters in order to communicate an idea, such as opposition to Congress's policy on military service by homosexuals, the Court has rejected the view that such an intent can transform what is otherwise unprotected conduct into conduct that is protected by the First Amendment. *O'Brien*, 391 U.S. at 376.

Nor should the conduct of denying equal access be treated as speech simply because the institution may have announced in advance its *reason* for engaging in the conduct. If such a prior announcement of one's motive were sufficient to trigger First Amendment scrutiny of the government's regulation of the conduct itself, a broad range of governmental regulation could be

affected. The refusal to pay taxes, arson of a government building, or trespass on a neighbor's property would trigger an analysis under *O'Brien* as long as the actor announced in advance a point he was trying to make. And the fact that such prefatory speech is necessary to give the conduct expressive content demonstrates that it is not the kind of inherently expressive conduct to which the *O'Brien* test attaches. An individual should not be able to heighten the government's burden of justification through such means.

Thus, an institution's denial of equal access is conduct, not speech. And while an institution's statements about why it is engaging in the conduct are themselves speech, they do not transform the conduct of denying equal access into speech.

2. *The Solomon Amendment satisfies the* O'Brien *standard*

Even if the act of restricting campus access were sufficiently expressive to come within the scope of the First Amendment, Congress retains the power to deal with the harm to military recruiting that arises from that conduct. Under *O'Brien*, a regulation of conduct that imposes an incidental burden on expression is constitutional "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. The last component of the analysis does not require the government to pursue the least restrictive means of furthering the government's interest. Instead, that component is satisfied when the government's interest "would be

achieved less effectively absent the regulation." *United States* v. *Albertini*, 472 U.S. 675, 689 (1985).

The Solomon Amendment satisfies the *O'Brien* standard. The Amendment serves the compelling governmental interest in the recruitment of the most talented men and women to serve in the armed forces; that interest is entirely unrelated to the suppression of ideas; and that interest would be achieved less effectively if military recruiters did not have the same access to students at institutions of higher education as other employers.

3. Congress reasonably concluded that equal access to students enhances the military's recruitment effort, and no further proof of that relationship is required

The court of appeals did not question the importance of the government's interest in effective recruiting. Nor did it suggest that such an interest is related to the suppression of ideas. Instead, the court held that respondents are entitled to a preliminary injunction under *O'Brien* because the government did not present evidence in court to prove that the Solomon Amendment enhances military recruiting efforts. Pet. App. 45a. Congress had sound reasons for concluding that on-campus recruiting furthers the government's interest in recruiting talented men and women for the military, however, and a further factual showing is not required.

The Solomon Amendment reflects Congress's judgment that the military's recent success in recruiting talented high school and college candidates was "in large part due to recruiting on school campuses." 140 Cong. Rec. 11,438 (1994). Congress's judgment that personal access to students on campus enhances recruitment accords with the experience and practice of institutions and employers throughout the Nation. If personal access to students on campus did not enhance effective recruitment, institutions of higher education and their departments would not invite employers on campus, and employers would not take advantage of the offer. Congress could reasonably conclude that such a ubiquitous practice is not premised on a widely-shared misperception, but that rather, such on-campus recruiting is efficient and effective.

Furthermore, in employing a rule of *equal* access, the Solomon Amendment relies on the *educational institutions'* own assessments of what is required for effective recruiting on their campuses. When an educational institution allows recruiters to conduct on-campus interviews, provides recruiters with conveniently located interview facilities, makes the recruiters' literature available through the institution's placement office, and offers recruiters assistance in scheduling interviews, it is manifesting its own judgment about what is needed for recruiters adequately to reach potential recruits. And when an educational institution denies those opportunities to military recruiters, while making them available to other potential employers, it is necessarily depriving the military of access that the institution itself views as integral to effective recruiting, and placing the military at a unique competitive disadvantage as against all other prospective employers. An educational institution's own expert judgment therefore furnishes a firm factual basis for applying the Solomon Amendment to that institution.

This Court's cases confirm that Congress had an adequate basis for enacting the Solomon Amendment, and that *O'Brien* does not require a further factual presentation. In *O'Brien* itself, there were no studies or other

evidence documenting draft card burnings and their effects. Instead, Congress was permitted to rely on its own experience to make a judgment that draft card destruction would jeopardize the effectiveness of the Selective Service System. 391 U.S. at 378-380. Similarly, in *Albertini*, the government was not required to introduce evidence demonstrating that persons who receive a letter from a commanding officer barring entry to a military base pose a danger to the base. Instead, the Court simply accepted the validity of Congress's judgment to that effect. 472 U.S. at 689. And in *Clark* v. *Community for Creative Non-Violence (CCNV)*, 468 U.S. 288 (1984), the Court did not require the government to submit a factual presentation on the extent to which overnight camping increases the wear and tear on park properties. The Court instead accepted the Park Service's judgment that preventing overnight camping would avoid a measure of actual or threatened damage to the parks. *Id.* at 299.

Those cases demonstrate that Congress has substantial leeway to make reasonable judgments under *O'Brien*, and that the judicial role is far more limited under *O'Brien* than under strict scrutiny. That reduced judicial role is appropriate. *O'Brien* involves the regulation of conduct, not speech, and "so long as the regulation is unrelated to the suppression of expression, '[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken work.'" *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 299 (2000) (plurality opinion) (quoting *Johnson*, 491 U.S. at 406).

A deferential judicial role is particularly appropriate when, as here, the constitutional issue involves a challenge to a military judgment. The Constitution assigns the power "[t]o raise and support Armies" to Congress.

U.S. Const. Art I, § 8, Cl. 12. This Court has recognized that First Amendment claims provide no basis for judicial second-guessing of empirical judgments about military readiness made by the political Branches and the military. See *Goldman* v. *Weinberger*, 475 U.S. 503, 509 (1986); cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981). Particularly in a time of War, when military recruiters are straining to meet recruitment goals, Congress should not be hamstrung by time-consuming judicial inquiries into the best way to meet those goals.[6]

4. *A further evidentiary showing is particularly unwarranted because institutions can decline assistance*

There is one further reason that the court of appeals erred in insisting on a further factual presentation, rather than accepting Congress's reasonable judgment that on-campus recruiting enhances the military's recruitment effort. Under the Solomon Amendment, an educational institution elects to accept federal funding with full awareness of the condition that it grant equal access to military recruiters. In that context, nothing in *O'Brien* suggests that the First Amendment confers on the institution a right to insist at a later date upon any more of a justification for that condition than Con-

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[6] Some language in the court of appeals' decision suggests that it believed that the government was required to show that on-campus recruitment at *law schools* enhances the military's recruitment effort. Pet. App. 45a. That is not the correct inquiry. The Solomon Amendment applies to all institutions of higher education that receive specified funding. Accordingly, the correct inquiry under *O'Brien* is whether Congress could reasonably conclude that on-campus recruiting at the entire class of such institutions enhances military recruitment, not whether on-campus recruiting at some subset of that class, such as law schools, enhances military recruitment. See *CCNV*, 468 U.S. at 296-297.

gress's judgment that equal access is necessary. If an institution that is considering whether to accept federal funds does not believe that there is sufficient empirical justification for the government to insist upon that condition, it is free to decline to enter into the agreements. That is the same option anyone has to decline to accept a contract offer that he believes is not justified or sufficiently backed up by information furnished by the other party.

E. The Solomon Amendment Does Not Impose An Unconstitutional Condition

The court of appeals invoked the doctrine of unconstitutional conditions. In the court's view, under that doctrine, the government may not achieve through a funding condition what it could not achieve through a direct regulatory requirement. Pet. App. 11a-12a. That argument fails at its premise. For the reasons discussed at pp. 18-23, 25-31, 33-39, the Solomon Amendment is constitutional and would be constitutional even if imposed as a direct regulatory requirement. In either connection, the Solomon Amendment's equal access rule simply does not violate the right to associate, impermissibly compel speech, or violate the *O'Brien* standard.

In any event, the court of appeals was also wrong to conclude that, if Congress could not validly impose the Solomon Amendment directly on educational institutions, it is equally invalid as a condition on the receipt of federal funds. That view is inconsistent with the Court's holding in *National Endowment for the Arts (NEA)* v. *Finley*, 524 U.S. 569 (1998), that Congress has authority under the Spending Clause to establish criteria for the receipt of federal funding "that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Id.* at 588.

Congress's authority under the Spending Clause is not without First Amendment limits. But, in general, those limits are exceeded and the doctrine of unconstitutional conditions is implicated only when Congress aims "at the suppression of dangerous ideas." *NEA*, 524 U.S. at 587 (citations omitted). Otherwise, the recourse for a person who does not wish to be bound by a funding condition is to decline federal assistance.

In the two cases in which the Court has invalidated a federal funding condition under the First Amendment, it did so because Congress was aiming at the suppression of ideas. *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 549 (2001) (viewpoint-based funding restriction on legal services violated the First Amendment because "Congress's antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest") (citations omitted); *FCC* v. *League of Women Voters*, 468 U.S. 364, 384 (1984) (law prohibiting "editorializing" by recipients of public broadcasting grants violated the First Amendment because it was motivated by a "desire to curtail expression of a particular point of view on controversial issues of general interest"). The other unconstitutional conditions cases cited by the court of appeals also involved efforts to suppress ideas. See *Rosenberger*, 515 U.S. at 830-831 (holding unconstitutional university's failure to fund religious publications on the ground that it was an attempt to suppress a particular point of view); *Perry* v. *Sindermann*, 408 U.S. 593, 598 (1972) (holding that public college's refusal to renew employment contract would violate First Amendment if based on employee's public criticism of college administrators); *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958) (adverting to issue that would be raised by statute that withheld tax exemption for engaging in certain speech

where statute was "aimed at the suppression of dangerous ideas") (citation omitted). The Court has never suggested that Spending Clause legislation that addresses conduct, is not aimed at the suppression of ideas, and attempts only to secure for the government equal access to prospective employees could constitute an unconstitutional condition on the exercise of First Amendment rights.

The Solomon Amendment is aimed solely at an institution's *conduct* in denying equal access to military recruiters. It is entirely indifferent to an institution's reason for denying equal access. Nor is the Solomon Amendment aimed at the suppression of ideas in any other respect. Educational institutions that receive federal funds are free to criticize the military on whatever ground they wish without risking the loss of federal funds. As the record reflects, law schools, their faculties, and their students have not hesitated to engage in such criticism. Law schools have issued statements advising students that they disapprove of the restrictions on military service by homosexuals. Pet. App. 98a. Faculties and students have adopted resolutions condemning Congress's policy. *Ibid.* And students and faculty have held demonstrations protesting on-campus military recruitment. *Ibid.* No educational institution has been denied federal funds for that open and vocal criticism. Because the Solomon Amendment addresses conduct, and does not aim at the suppression of ideas, it does not implicate the doctrine of unconstitutional conditions.[7]

[7] The court of appeals concluded that Congress has authority to "endorse one viewpoint over another" only when it "create[s]" a "particular spending program." Pet. App. 13a n.9. Because the Solomon Amendment does not endorse one viewpoint over another, the scope of Congress's authority to do so is not at issue here. To the extent the court of appeals was suggesting a more general limitation on Congress's authority under the Spending Clause, that suggestion is incorrect. In addition to creating programs and defining their limits, Congress may also impose conditions relating to an institution's conduct of its own educational program when that program receives federal financial assistance. See, *e.g.*, 20 U.S.C. 1681(a) (prohibiting sex discrimination in any educational program receiving federal assistance); 42 U.S.C. 2000d (2000 & Supp. I 2001) (prohibiting racial discrimination in any federally assisted program); 20 U.S.C. 1687 (defining the relevant "program" for purposes of both statutes as the entire college or university when any part of it receives federal assistance).

For that reason, and for the reasons discussed at pp. 23-25, 32, 39-40, even if Congress lacked authority to impose the equal access condition as a direct regulatory requirement, the Solomon Amendment would still be valid Spending Clause legislation. The First Amendment does not preclude the government from conditioning federal funds for educating students on an equal opportunity to recruit those students.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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